

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1494

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH KOBLINSKI,
Defendant-Appellant.

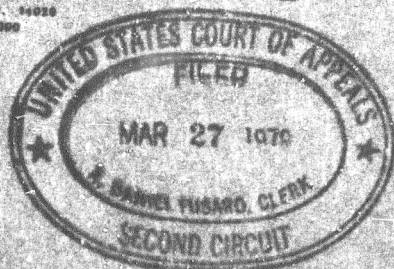
(ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK)

BRIEF FOR PLAINTIFF-APPELLEE

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No. 77-1494

UNITED STATES OF AMERICA,
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On Appeal From the United States District Court
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BRIEF FOR PLAINTIFF-APPELLEE
Preliminary Statement

The Government agrees with the Preliminary Statement set forth in defendant's brief.

Statement of Facts

At trial the Government presented evidence that beginning on or about the 12th day of February, 1975 and continuing through the 6th day of June 1975, individuals named in the indictment, including Thaddeus Czosnyka and Joseph Koblinski were engaged in a conspiracy to deal and sell explosives, in violation of Title 18, United States Code, Section 371.

The proof adduced during the trial against the defendant Joseph Koblinski was in the form of testimony of Robert Izzo, Special Agent, Bureau of Alcohol, Tobacco and Firearms.

Izzo testified that while acting in an undercover capacity, conducting an investigation in the Lackawanna area, he saw and talked to co-defendants Czosnyka and Koblinski on a number of occasions (36-37)*. The first time he saw and talked to Czosnyka was on March 27, 1975 at the latter's residence, at which time he purchased four sticks of dynamite from Czosnyka (38-44).

Izzo further testified that he returned to Czosnyka's residence on April 14, 1975 for the purpose of making another purchase of dynamite (47), and that upon his arrival Izzo was introduced by Czosnyka to the defendant, who was there at the time (52). At that time, Izzo, Czosnyka and the defendant had a conversation relative to dynamite. Izzo asked Czosnyka if he had any blasting caps for dynamite at which point the defendant said to Izzo, "I have something better than caps". At that point, the defendant went to a nearby vehicle and removed a device which he handed to Izzo, repeating that the device was better than a blasting cap. Izzo testified that he recognized the device to be a railroad torpedo, an explosive device and observed that inscribed

* Refers to Transcript page number

thereon were the words, "danger, explosive". Izzo then asked the defendant if he could secure some railroad torpedos to sell to him (Izzo), to which the defendant responded that he had a Canadian supplier; that he could sell them in quantity for \$1.00 each; and that Izzo should keep in contact with Czosnyka if he wanted to purchase any railroad torpedos (52-54).

The next time Izzo saw and talked to the defendant was on April 19, 1975, at which time he indicated to the defendant that he wanted to purchase some railroad torpedos. At that time the defendant told Izzo that he was making arrangements with a Canadian supplier, that he could supply in gross, and that he would sell the torpedos at a rate of two for \$5.00 (55).

At this point, the defendant's objection to the testimony was sustained to the extent that the trial court instructed the jury to disregard the conversation between Izzo and the defendant concerning the purchase and sale of other torpedos (56-58). In ruling on the defendant's motion at the close of the Government's case, the court clarified its earlier ruling on what evidence regarding railroad torpedos it had admitted, stating that it had permitted some of the testimony but struck the continuing testimony, presumably, that relating to the second conversation (234).

Izzo testified that he made a third purchase of dynamite from Czosnyka at the latter's residence on April 30, 1975 (61) and that the next time he saw the defendant was with Czosnyka on June 5, 1975 at Czosnyka's residence (69). At that time Izzo asked Czosnyka, in the defendant's presence, if he had dynamite to sell, to which Czosnyka responded that he expected to have some on June 6, 1975. Czosnyka told Izzo to return to his (Czosnyka's) residence on June 6, 1975 at 3:00 p.m.; that he would have dynamite to sell then; that he had some personal business to take care of; and that Izzo could deal and do business with the defendant at that time. Izzo

testified that he then asked the defendant if he knew the arrangements regarding the dynamite and if he knew what was happening, to which the defendant responded, "I am cool and I will be here to take care of business" on June 6, 1975 (69-72).

The further testimony of Izzo was that he returned to the Czosnyka residence on June 6, 1975 and met with Czosnyka who then told Izzo that he had to leave on some personal business. Czosnyka told Izzo that he could wait for his return or wait for the defendant to arrive to take care of business. Izzo remained in the area and met with Czosnyka at his home one hour later. At that time, Czosnyka answered his telephone and Izzo heard Czosnyka ask on the telephone where the package was and state, "okay, it's under the back steps of the house out front". Izzo was told by Czosnyka that the person to whom he was speaking on the telephone was the defendant. At that time, Izzo took the telephone and carried on a conversation with the individual at the other end, recognizing the voice as that of the defendant (72-75). In that conversation the defendant told Izzo that the package was in the cigar box under the back steps of the house in front of Teddy's and that he, the defendant, had placed it there (78). Izzo testified that he then went to the stated location and discovered a package containing four sticks of dynamite (79).

It was also Izzo's testimony that he talked to the defendant on June 27, 1975, after his arrest, and at that time the defendant admitted to Izzo that he had been present at meetings with him and Czosnyka on April 14, 1975 and June 5, 1975; that at the latter meeting he said he would take care of business concerning the dynamite; and that he had spoken to Izzo on the telephone at the Czosnyka residence on June 6, 1975.

ARGUMENT

POINT I

Evidence of Defendant's Similar Acts to Prove Intent to Join in Conspiracy Properly Admitted.

Defendant contends that evidence of his declarations to and transactions with Agent Robert Izzo regarding the sale and supply of railroad torpedos was not relevant within the meaning of Rule 402 of the Federal Rules of Evidence and that its admission by the trial court, therefore, constituted reversible error. The basis for the defendant's contention is that (1) there was no proof introduced that railroad torpedos are "explosives" within the definition of applicable statutes and (2) such acts on the part of the defendant were not a part of the conspiracy to sell explosives, particularly dynamite, charged in the indictment.

This Court has long followed the "inclusionary" rule with respect to "other acts" evidence, finding it admissible if it is substantially relevant for some purpose other than to show the criminal character or disposition of the defendant. *United States v. Bennedetto*, Slip Opinion, Docket Number 77-1306, Decided February 24, 1978; *United States v. Brettholz*, 485 F2d 483 (2nd Cir. 1973) cert. denied; *Santiago v. United States*, 415 U.S. 976; *United States v. Deaton*, 381 F2d 114 (2nd Cir. 1967). This rule is codified in Rule 404(b) of the Federal Rules of Evidence which provides:

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

To be admissible, an act must be shown to be connected to the defendant and to be similar to the act or acts for which the

defendant has been indicted. Similar acts, including crimes, are those which occurred in close temporal proximity and are closely related in subject matter and manner to the crime charged in the indictment. *United States v. Chestnut*, 533 F2d 40 (2nd Cir. 1976); *United States v. Santiago*, 528 F2d 1130 (2nd Cir. 1976); *United States v. Brettholz*, *supra*, *United States v. Deaton*, *supra*.

The defendant's declarations and transactions with respect to the railroad torpedoes constituted similar acts on the part of the defendant. They occurred on April 14, 1975, within the time of the alleged conspiracy which commenced on February 12, 1975 and terminated on June 6, 1975. They occurred simultaneously with the April 14, 1975 sale of dynamite, the latter being the very object of the conspiracy.

Not only were the acts of the defendant close in time to the acts charged in the indictment, but they were also closely related to the subject matter. Contrary to defendant's contention, testimony was admitted that a railroad torpedo was in fact an "explosive". Furthermore, it is clear that defendant's statement that he had something better than caps, in response to Izzo's request for caps for the dynamite, and the defendant's sale of one railroad torpedo on April 14, 1975, related to the use of the dynamite sold that day and were offered for use in conjunction therewith (51-54).

It is well established, and the defendant concedes (Defendant's Brief, 9), that similar acts are admissible as probative of the issue of intent, when intent is a material element of the crime charged, such as conspiracy. *United States v. Grady*, 544 F2d 598 (2nd Cir. 1976); *United States v. McClean*, 528 F2d 1250 (2nd Cir. 1976); *United States v. Bermudez*, 526 F2d 89 (2nd Cir. 1975); *United States v. Marchisio*, 344 F2d 653 (2nd Cir. 1965) and *United States v. Stadter*, 336 F2d 326 (2nd Cir. 1964).

The defendant's declarations and transactions with respect to the railroad torpedos were probative of his intent to join the conspiracy to deal and sell dynamite. As stated previously, it is clear that the defendant's offer of a railroad torpedo as "something better" to Agent Izzo related to the dynamite sold on April 14, 1975, and was offered to be used in conjunction therewith (52). A jury could reasonably infer that the statement and sale were made to promote and assist in that sale of dynamite and were therefore probative of his intent to further that sale and to be considered a part thereof.

Although the similar acts in this case may be found to be acts in furtherance of the conspiracy, or probative of the organization and structure of the conspiracy, they do not have to be either, contrary to defendant's contention (Defendant's Brief, 9, 17). *United States v. Natale*, 526 F.2d 1160 (2nd Cir. 1975); *United States v. Tramunti*, 513 F.2d 1087 (2nd Cir. 1975). Furthermore, similar acts, in order to be admissible, do not have to be charged in the indictment, *United States v. Grady*, *supra*, or constitute crimes in themselves. *United States v. Feldman*, 136 F.2d 394 (2d Cir. 1943).

The defendant next contends that even if the evidence regarding railroad torpedoes could properly be considered relevant on the issue of defendant's intent to join the conspiracy charged, it should have been excluded, pursuant to Rule 403 of the Federal Rules of Evidence which provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

The trial court is required, pursuant to Rule 403, to rule on the admissibility of similar acts evidence and in so doing "to balance all of the relevant factors to determine whether the probative value of the evidence outweighs its prejudicial

character" *United States v. Brettholz, supra*, 487. The determination is within the trial court's broad discretion *United States v. Natale, supra*, and *United States v. Byrd*, 352 F2d 570 (2nd Cir. 1965). The ruling of the trial court is not to be disturbed unless that discretion is clearly abused. *United States v. Dwyer*, 539 F2d 924 (2nd Cir. 1976).

The standard to be applied in determining the likelihood that the evidence would result in unfair prejudice is whether the introduction of this information at trial would "suggest decision on an improper basis, commonly, though not necessarily, an emotional one". NOTES of Advisory Committee on Federal Rules of Evidence, Rule 403.

In applying this standard to conspiracy cases, this Court has consistently upheld the trial court's admission of similar acts evidence as probative of the issue of intent. The trial court's admission of ten prior narcotic sales by the defendant to prove the defendant's intent to participate in a conspiracy to distribute narcotics has been held to be proper, *United States v. Brettholz, supra*. In *United States v. Natale, supra*, this Court upheld the trial court's admission of evidence of several usurious transactions between the defendant and a number of his debtors to indicate the type of debtor-creditor relationship that existed between them; the trial court admitting this as probative of the defendant's intent to use extortionate means to collect credit. It is submitted that the similar acts evidence admitted in these cases presented a substantially greater danger of prejudice to the defendant than the case at bar, and that, nevertheless, the court determined that the danger of prejudice did not outweigh the probative value of such evidence.

In balancing the probative value against the potential prejudicial effect of similar acts evidence, the trial court must consider whether the evidence is cumulative and whether

there is a real need on behalf of the Government for its introduction. *United States v. Byrd, supra.*

Aside from his presence, the defendant's declarations and actions regarding the railroad torpedoes were the only evidence of his intent to join the conspiracy on April 14, 1975. If they had been excluded, the only evidence of defendant's intent would have been his presence at the meeting with Izzo and Czosnyka. This alone, absent proof that such presence facilitated the object of the conspiracy, would be insufficient to prove an intent to join the conspiracy at that time. *United States v. Ragland*, 375 F2d 471 (2nd Cir. 1967). Therefore, the Government had a "real necessity which required it to offer the evidence in its main case". *United States v. Byrd, supra*, 575.

For the foregoing reasons, evidence of the defendant's declarations and transactions with respect to railroad torpedoes was properly admitted by the trial court.

POINT II

There was Sufficient Evidence of Defendant's Participation in a Conspiracy to Deal and Sell Explosives, Particularly Dynamite.

Defendant concedes the existence of a conspiracy and his knowledge of its existence (Defendant's Brief, 22), but contends that the Government failed to produce sufficient evidence from which the jury could find that he knowingly participated in the conspiracy.

It is well settled that in determining whether the Government sustained its burden of proof at trial, the evidence and the inferences to be drawn therefrom must be considered in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60 (1942); *United States v. Koss*, 506 F2d 1103 (2nd Cir. 1974); *United States v. McCarthy*, 473 F2d 300 (2nd Cir. 1972).

Furthermore, as defendant concedes, in evaluating the evidence of defendant's participation, the court should bear in mind that once a conspiracy is found to exist, very little is required to show that a defendant became a participant; slight evidence may be all that is required to connect a defendant with a conspiracy. *United States v. Marrapese*, 486 F2d 918 (2nd Cir. 1973), cert. denied 415 U.S. 994 (1974).

Nor is it necessary to prove that a defendant knows the scope of a conspiracy or the identity of the co-conspirators. All that must be proved is that the defendant was aware of the essential objective of the conspiratorial plan and acted in furtherance thereof. *Blumenthal v. United States*, 332 U.S. 539 (1947); *United States v. Sisca*, 503 F2d 1337 (2nd Cir. 1974), cert. denied 419 U.S. 1008; *United States v. Sperling*, 506 F2d 1323 (2nd Cir. 1974), cert. denied 420 U.S. 962. Additionally, as defendant concedes, the existence of a conspiracy need not be proven by direct evidence, but may be proven by circumstantial evidence. *Glasser v. United States*, *supra*. Indeed, a conspiracy conviction may be based entirely upon circumstantial evidence. *United States v. Ragland*, 375 F2d 471 (2nd Cir. 1967) cert. denied 390 U.S. 925 (1968).

While it is true, as defendant contends, that a defendant's presence alone at a meeting of conspirators may not be sufficient to establish participation in that conspiracy, it is one of the factors to be considered by the trier of fact. *United States v. Calabro*, 449 F2d 885 (2nd Cir. 1970), cert. denied 405 U.S. 928 (1972). Furthermore, where a defendant's knowledge of the conspiracy is conceded, as in the case at bar, defendant's presence at more than one meeting may be sufficient to establish participation. *United States v. Cirillo*, 499 F2d 872 (2nd Cir. 1974). Additionally, it is clear that mere presence at a meeting of conspirators may be sufficient to establish participation in a conspiracy if the defendant is likely to be aware that an offense is to occur and defendant's presence facilitates the object of the conspiracy. *United States v. Ragland*, *supra*.

To establish participation in the conspiracy, it is necessary to introduce evidence that a defendant in some sense promoted the venture himself, made it his own, had a stake in its outcome. *United States v. Cianchetti*, 315 F2d 584 (2nd Cir. 1963); *United States v. Falcone*, 109 F2d 579 (2nd Cir. 1940) aff'd. 311 U.S. 205 (1940).

The evidence provided ample basis for inferring that the defendant assisted in the furtherance of a conspiracy to deal and sell dynamite, making the venture his own, on a number of occasions. The defendant's sale and offer to supply railroad torpedoes to Robert Izzo on April 14, 1975, while extolling them as something better than blasting caps, can reasonably be inferred to have been done to assist in and promote the sale of dynamite on that occasion, and perhaps future occasions (52). It is clear that the defendant's presence at the meeting of June 5, 1975, a meeting arranged in advance by Czosnyka and Izzo to discuss another sale of dynamite, and the defendant's offer at that meeting to take care of the sale of dynamite the next day if Czosnyka was unavailable, furthered the object of the conspiracy (69-72). It is equally clear that the defendant's telephone conversation with Izzo on June 6, 1975 during which he told Izzo the exact location of the dynamite to be sold that day and his statement that he, himself, had placed it there, revealed acts which, if believed to have occurred, promoted the plan to sell dynamite and rendered the defendant a part thereof (72, 75, 78).

For the foregoing reasons, there was sufficient evidence of defendant's participation in the conspiracy to deal and sell explosives, particularly dynamite.

Conclusion

For the foregoing reasons, the conviction of Joseph Koblinki should be affirmed.

Respectfully submitted,

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USA vs. Joseph Koblinski
77-1494

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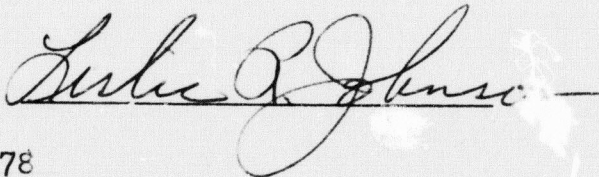
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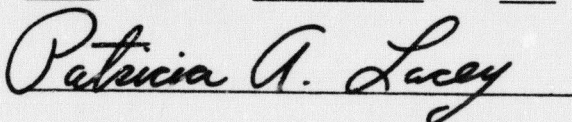
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